EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 4:05-cv-00329-TCK-SAJ
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	
	)	

TYSON FOODS, INC.'S AMENDED MOTION TO DISMISS COUNTS 4-10 OF THE FIRST AMENDED COMPLAINT AND INTEGRATED OPENING BRIEF IN SUPPORT

TABLE OF AUTHORITIES

CASES

American Wildlands v. Browner, 260 F.3d 1192 (10th Cir. 2001) 15

Arkansas v. Oklahoma, 503 U.S. 91 (1992) 2, 14

Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983) 3

Baldwin v. Seelig, 294 U.S. 511 (1935) 5

Bigelow v. Virginia, 421 U.S. 809 (1975) 8

Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991) 7

BMW of North America v. Gore, 517 U.S. 559 (1996) 9

Bonaparte v. Tax Court, 104 U.S. 592 (1881) 7

Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986) 4, 5

City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996) 15

Conley v. Gibson, 355 U.S. 41 (1957) 4

Diamond v. Chakrabarty, 447 U.S. 303 (1980) 11

Edgar v. MITE Corp., 457 U.S. 624 (1982) 4-6

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) 9-11

GFF Corp. v. Associated Wholesale Grocers, Inc., 130 F.3d 1381 (10th Cir. 1997) 3

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 2

Guardians Association v. Civil Serv. Commission, 463 U.S. 582 (1983) 10

Hans v. Louisiana, 134 U.S. 1 (1890) 7

Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143 (1934) 7

Healy v. Beer Inst., 491 U.S. 324 (1989) 4-7

Illinois v. Outboard Marine Corp., 680 F.2d 473 (7th Cir. 1982) 18

International Paper Co. v. Oullette, 479 U.S. 481 (1987) 13

Milwaukee v. Illinois ("*Milwaukee I*"), 406 U.S. 91 (1972) 12, 13

Milwaukee v. Illinois ("*Milwaukee II*"), 451 U.S. 304 (1981) ..... *passim*

Missouri v. Illinois, 200 U.S. 496 (1906) 2, 10

Murrell v. Sch. Dist. No. 1, 186 F.3d 1238 (10th Cir. 1999) 4

National Audubon Society v. Department of Water & Power of the City of Los Angeles, 869 F.2d 1196 (9th Cir. 1988) 12

New Jersey v. New York, 283 U.S. 336 (1931) 10, 11

New York v. New Jersey, 256 U.S. 296 (1921) 10

Oliver v. Oklahoma ABC Bd., 359 P.2d 183 (Okla. 1961) 9

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 8

Pronsolino v. Nostri, 291 F.3d 1123 (9th Cir. 2001) ..... *passim*

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) 6

State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408 (2003) 8

Sutton v. Utah State Sch. for Deaf & Blind, 173 F.3d 1226 (10th Cir. 1999) 3

Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) 11

United States v. Oswego Barge Corp. (In re Oswego Barge Corp.), 664 F.2d 327, 335 (2d Cir. 1981) 15

Wallis v. Pan American Petroleum Corp., 384 U.S. 63 (1966) 11

Wash. Legal Found. v. Mass. Bar Found., 993 F.2d 962 (1st Cir. 1993) 3

Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954) 8

Yanaki v. Iomed, Inc., 415 F.3d 1204 (10th Cir. 2005) 3

STATUTES AND CONSTITUTIONAL PROVISIONS

U.S. Const., Art. I, § 8 4

33 U.S.C. § 1251(a), CWA § 101(a) 10

33 U.S.C. § 1313, CWA § 303 ..... 15, 16

33 U.S.C. § 1329, CWA § 319 17

33 U.S.C. § 1362(14), CWA § 502(14) 13

The Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 42 (1987) 15, 16

Federal Water Pollution Control Act Amendments of 1972,
Pub. L. No. 92-500, 86 Stat. 816 (1972) 12

Ark. Code Ann. § 15-20-901 (2006) 9

Ark. Code Ann. § 15-20-1101 (2006) 9

Ark. Code Ann. § 15-20-1114 (2006) 9

Okla. Stat. tit. 2 § 10-9 (2006) 9

Okla. Stat. tit. 50 § 4 (2006) 9

REGULATIONS

40 C.F.R. § 130.7 (2006) 16

40 C.F.R. § 131 (2006) 15

40 C.F.R. § 131.10 (2006) 16

40 C.F.R. § 131.11 (2006) 15

68 Fed. Reg. 60,653 (Oct. 23, 2003) 13, 17

35 Fed. Reg. 15,623 (Oct. 6, 1970) 13

SECONDARY SOURCES

H.R. Rep. No. 92-911 (1972) 14

TABLE OF CONTENTS

I. INTRODUCTION 1

II. BACKGROUND 2

III. LEGAL STANDARD 3

IV. ARGUMENT 4

A. OKLAHOMA'S CLAIMS VIOLATE THE COMMERCE CLAUSE AND THE SOVEREIGNTY OF ARKANSAS 4

1. Regulation of Commerce In Another State Violates the Commerce Clause 4

2. Extraterritorial Application of Oklahoma Law Violates the Sovereignty of Arkansas 7

B. OKLAHOMA'S FEDERAL COMMON LAW NUISANCE CLAIM HAS BEEN DISPLACED BY THE CLEAN WATER ACT 9

1. "There is no general federal common law" 10

2. Federal Common Law Only Exists In Limited Areas And May Be Displaced At Any Time By Congress 11

3. The Clean Water Act And Its Subsequent Amendments Displaced Federal Common Law On Issues of Interstate Water Quality 12

V. CONCLUSION 18

I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 12(b)(6) and Local Rule of Civil Procedure 7.1, Defendant Tyson Foods, Inc., joined by Tyson Poultry, Inc., Tyson Chicken, Inc., and Cobb-Vantress, Inc. (collectively "Defendants"), hereby move this Court for an order completely or partially dismissing claims four, five, six, seven, eight, nine, and ten of the First Amended Complaint ("Complaint") for failure to state a claim upon which relief can be granted.

The State of Oklahoma and Oklahoma's Secretary of the Environment (collectively the "Oklahoma Plaintiffs" or "Plaintiffs") brought suit in this Court against fourteen out-of-state poultry companies. The lawsuit alleges that the independent farmers or "growers" who raise poultry for defendants pursuant to contracts are violating Oklahoma common law and statutes by engaging in the longstanding agricultural practice of using poultry litter as fertilizer.[1] Specifically, the Oklahoma Plaintiffs claim that water running off fertilized fields pollutes the Illinois River Watershed ("IRW"), which crosses from Arkansas into Oklahoma (and eventually flows back into Arkansas after joining the Arkansas river).

Among other theories, the Oklahoma Plaintiffs allege that the use of poultry fertilizer in both Oklahoma and Arkansas creates a nuisance *per se* under Oklahoma law (count 4); creates a nuisance under federal common law (count 5); constitutes a trespass upon Oklahoma's property interests under Oklahoma law (count 6); violates Oklahoma statutory prohibitions on waste disposal (count 7); violates Oklahoma's Animal Waste Management Plans (count 8); violates

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[1] Defendants Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., George's, Inc., George's Farms, Inc., Peterson Farms, Inc., and Simmons Food, Inc. all have their principal place of business in the State of Arkansas. Complaint at ¶¶ 6-10, 15-18. Defendant Aviagen, Inc. has its principal place of business in Alabama. *Id.* at 10. Defendants Cal-Maine Foods, Inc. and Cal-Maine Farms, Inc. have their principal places of business in Mississippi. *Id.* at ¶¶ 11-12. Defendants Cargill, Inc. and Cargill Turkey Production, LLC have their principal places of business in Minnesota. *Id.* at ¶¶ 13-14. Defendant Willow Brook Foods, Inc. has its principal place of business in Missouri. *Id.* at 19.

Oklahoma statutes and regulations barring waste discharges to surface and ground waters (count 9); and unjustly enriches the Defendants under Oklahoma law (count 10). For convenience, Counts 4 and 6-10, which seek to apply Oklahoma common law, statutes, and regulations will be referred to collectively as the "Oklahoma Law Claims."

To the extent that the Oklahoma Law Claims pertain to activities occurring in Arkansas or pollution allegedly emanating from Arkansas, those claims should be dismissed. First, to the extent the Oklahoma Law Claims seek to apply Oklahoma law to activities in the State of Arkansas (thereby displacing Arkansas statutes, regulations, and common law), these claims constitute an impermissible attempt at extraterritorial regulation in violation of the Commerce and Due Process Clauses of the United States Constitution. Second, the Oklahoma Plaintiffs' claim for relief under the federal common law of nuisance (Count 5) must be dismissed as no such federal common law of nuisance exists to govern claims of interstate water pollution.

II. BACKGROUND

Disputes concerning control over interstate waters and interstate water pollution are not novel. *See, e.g.*, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *Missouri v. Illinois*, 200 U.S. 496 (1906). In fact, the States of Arkansas and Oklahoma have recently litigated over pollution levels in the Illinois River. *See Arkansas v. Oklahoma*, 503 U.S. 91 (1992) (upholding EPA's issuance of a Clean Water Act permit to City of Fayetteville, Arkansas on the grounds that it would not violate Oklahoma's water quality standards). Here, the State of Oklahoma alleges that Defendants' independent contractors are causing pollution throughout the entire 1,069,530 acre IRW, which is bisected by the Arkansas-Oklahoma border. Complaint at ¶ 22; Complaint, Ex. 1 (map). However, the Oklahoma Plaintiffs admit that approximately half of the IRW lies outside of Oklahoma's boundaries. *See id.* And, Plaintiffs do not limit their claims to activities occurring within the state of Oklahoma; to the contrary, the claims are based on the assertion that

farmers throughout the IRW are "routinely and repeatedly applying" poultry litter to lands within the entire IRW. Complaint at ¶ 49. *See also id.* at ¶¶ 22-31, 54, 58-64.

The Plaintiffs further admit that, by invoking Oklahoma law, their goal is to change the agricultural methods and practices of persons residing throughout the region, including in Arkansas. *See* Complaint at ¶¶ 1, 69, IV.3 (requesting a permanent injunction requiring Defendants "to immediately abate" the use of poultry fertilizer throughout the IRW). In short, Plaintiffs admit that they are attempting to use the Oklahoma Law Claims to impose the standards of Oklahoma state law outside the borders of the State.

III. LEGAL STANDARD

"The court's function on a Rule 12(b)(6) motion is . . . to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Yanaki v. Iomed, Inc.*, 415 F.3d 1204, 1211 (10th Cir. 2005) (*quoting Sutton v. Utah State Sch. for Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999) (quotations omitted)). In considering the motion, the court must accept all well-pleaded factual allegations in the complaint as true and view them in the light most favorable to the nonmoving party. *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997). In spite of the deference afforded to the Plaintiff's factual allegations, it is not proper for the court to assume that the plaintiff can prove facts not alleged in the complaint "or that the defendants have violated the . . . laws in ways that have not been alleged." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). Moreover, the court does not give any deference to "unsupported conclusions or interpretations of law." *Wash. Legal Found. v. Mass. Bar Found.*, 993 F.2d 962, 971 (1st Cir. 1993). Dismissal is appropriate if it "'appears beyond doubt that the plaintiff can prove no set of facts in support of [his] claim which would entitle [him] to relief.'"

Murrell v. Sch. Dist. No. 1, 186 F.3d 1238, 1244 (10th Cir. 1999) (*quoting Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

IV. ARGUMENT

The Oklahoma Plaintiffs seek to apply federal common law and Oklahoma state law to practices in, and water pollution allegedly emanating from, another State. These claims should be dismissed as a matter of law.

A. OKLAHOMA'S CLAIMS VIOLATE THE COMMERCE CLAUSE AND THE SOVEREIGNTY OF ARKANSAS

The Oklahoma Plaintiffs seek to extend Oklahoma law beyond the State's borders into Arkansas. To the extent that the Oklahoma Law Claims concern commercial activities conducted in, and pollution allegedly emanating from, Arkansas, they run afoul of the dormant Commerce Clause, U.S. Const., Art. I, § 8, and the constitutional principles of federalism and due process that afford each State sovereignty within its own borders.

1. Regulation of Commerce In Another State Violates the Commerce Clause

The dormant Commerce Clause prohibits States from regulating "commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (*quoting Edgar v. MITE Corp.*, 457 U.S. 624, 642-643 (1982) (plurality opinion)). Put another way, "[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id.* Thus, Plaintiffs, through this litigation, cannot impose Oklahoma's commercial and environmental standards upon citizens of Arkansas conducting business within Arkansas.

Indeed, the Supreme Court has expressed little hesitation in prohibiting State regulatory action that has the practical effect of directly regulating interstate commerce. *See, e.g.*, *Healy*, 491 U.S. at 324 (striking down a liquor price affirmation statute); *Brown-Forman Distillers*

Corp. v. New York State Liquor Auth., 476 U.S. 573, 585 (1986) (striking down New York liquor regulations where they would "force those other States to alter their own regulatory schemes"); *Edgar*, 457 U.S. at 624 (striking down Illinois law which imposed regulations upon corporate takeovers of companies with certain minimum contacts with Illinois); *Baldwin v. Seelig*, 294 U.S. 511, 521-26 (1935) (striking down minimum price requirements for milk). In all of these cases, the regulating State had an interest in protecting its citizens from certain harms—such as higher prices or potentially deceptive or harmful investment practices—but, due to the direct regulatory effect upon interstate commerce, the Supreme Court has "struck down the [state action] without further inquiry." *Brown-Forman*, 476 U.S. at 579.

Here, by attempting to impose Oklahoma standards on Arkansas citizens, the Oklahoma Plaintiffs seek to do that which was prohibited in *Healy*, *Brown-Forman*, *Edgar*, and *Baldwin*. The Oklahoma Plaintiffs undeniably endeavor to impose additional obligations on commerce occurring wholly within Arkansas, *see id.* at VI.3 (seeking a permanent injunction to abate Tyson's alleged "pollution-causing" business practices throughout the IRW). The complaint plainly sets forth purported violations of Oklahoma's statutory regulatory scheme governing waste discharges and Oklahoma's Animal Waste Management Plans for use of poultry litter as a natural fertilizer (counts 7-10) and seeks to enjoin that practice, even against that activity which occurs within Arkansas.

Moreover, the Oklahoma Plaintiffs' action, by attempting to enforce Oklahoma law within the territorial borders of Arkansas, will plainly displace Arkansas' statutes, regulations, and common law, or it will require Defendants to conform to two potentially incompatible sets of standards. *Healy*, 491 U.S. at 337 (noting that the "practical effect" of competing state legislation "is to create just the kind of competing and interlocking local economic regulation

that the Commerce Clause was meant to preclude"). Thus, the Oklahoma Plaintiffs' lawsuit "must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Id.* *See also Edgar*, 457 U.S. at 642 ("[I]f Illinois may impose such regulations, so may other States; and interstate commerce in securities transactions generated by tender offers would be thoroughly stifled."). Should Defendants be found liable under the Oklahoma Law Claims, they may be required to change their commercial practices to avoid future violations of Oklahoma law even though these practices are currently lawful in Arkansas. The Commerce Clause precludes Plaintiffs from requiring Arkansas citizens "to seek regulatory approval in [Oklahoma] before undertaking" commercial activity in Arkansas. *Healy*, 491 U.S. at 337.

Nor can Plaintiffs contend that the Defendants' business practices—be it the more general raising of poultry or the more specific use of chicken litter as natural fertilizer—are not commerce. Control of a company's societal obligations, such as the management of pollution, enforcement of labor laws, and restrictions on anti-competitive activities have historically been viewed as the regulation of interstate commerce. *See, e.g.*, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (federal regulation of water pollution is premised on Congress' power to regulate interstate commerce).

It is clear that the Oklahoma legislature never intended to apply its laws in other states, but even if the legislature had such an intent, the enforcement of the law "is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 336.

In short, suing to compel the businesses of other States to comply with the Oklahoma Plaintiffs' state laws constitutes the direct regulation of interstate commerce. *See Healy*, 491 U.S. at 332. This Court should dismiss the Oklahoma law claims as a violation of the Commerce Clause.

2. Extraterritorial Application of Oklahoma Law Violates the Sovereignty of Arkansas

Similarly, it is axiomatic that each State is a sovereign entity unto itself. "[T]he attributes of sovereignty [are] enjoyed by the government of every State in the Union." *Hans v. Louisiana*, 134 U.S. 1, 13 (1890). *See Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) ("the States entered the federal system with their sovereignty intact"). So, while the Plaintiffs proclaim their "complete dominion" regarding "the interest of the State of Oklahoma," Complaint at ¶ 5, they have no dominion, control, influence, or authority over Arkansas' agricultural, environmental or commercial laws. *See Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction . . . Each State is independent of all the others in this particular"). Plaintiffs endeavor to project their own policy choices into Arkansas, a sovereign State entitled to make differing policy choices regarding agricultural practices. Such an attempt violates the fundamental principal that a State "cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states." *Hartford Acc. & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 149 (1934).

The Constitution protects the citizens of all States from interstate encroachments of State power; the Supreme Court has emphasized "the due process principle that a state is without power to exercise 'extraterritorial jurisdiction,' that is, to regulate and control activities wholly beyond its boundaries." *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 70 (1954). Accordingly, in a wide range of contexts, the Court has crafted remedies under the Due Process

Clause of the Fourteenth Amendment to preclude the extraterritorial application of one State's laws into another State's jurisdiction. *See, e.g.*, *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (due process clause limitations on punitive damages); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (due process clause limitations on class certification); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (due process clause limitation of proscribing advertising). As a common thread in each of these decisions, the Supreme Court has prohibited the enforcement of State laws that would make unlawful conduct that is otherwise lawful in the State where the activity occurred. *See State Farm*, 538 U.S. at 421 ("A State cannot punish a defendant for conduct that may have been lawful where it occurred."); *Shutts*, 472 U.S. at 822 (holding that Kansas cannot abrogate other inconsistent State laws for activities occurring within those States); *Bigelow*, 421 U.S. at 824 ("Virginia possessed no authority to regulate the services provided in New York. . .").

Here, the Oklahoma Plaintiffs' attempt to enforce Oklahoma law within Arkansas plainly violates this due process principle, which finds support in the most fundamental tenets of federalism. *See State Farm*, 538 U.S. at 422 ("A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction."). Arkansas has an extensive set of statutes and regulations that would be displaced if the Oklahoma Plaintiffs were successful in projecting Oklahoma law into Arkansas. Arkansas regulates the land application of poultry litter within Arkansas in accordance with its own legislative judgments.[2] *See generally* Ark. Code Ann.

[2] Oklahoma also regulates the land application of poultry litter, a lawful act in Oklahoma that is protected from the very nuisance action that Plaintiff brings against Tyson's Arkansas facilities. *See* Okla. Stat. tit. 2 §§ 10-9-81 (Oklahoma Registered Poultry Feeding Operations Act); Okla.

§§ 15-20-901 -906 (Arkansas Poultry Feeding Operations Registration Act); 15-20-1101 -1114 (Arkansas Soil Nutrient Application and Poultry Litter Utilization Act); *see* 15-20-1114 (governing potential conflicts between land application of poultry litter and Arkansas water and air pollution control laws). Oklahoma has not alleged that land application of poultry litter in Arkansas violates any of these Arkansas laws. In pursuit of their own goals, the Oklahoma Plaintiffs would rob Arkansas of the "police power [which] is an attribute of sovereignty inherent in every sovereign state . . . ." *Oliver v. Oklahoma ABC Bd.*, 359 P.2d 183, 189 (Okla. 1961).

In sum, entertaining the Oklahoma Law Claims would violate basic "principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *BMW of North America v. Gore*, 517 U.S. 559, 573 (1996). Because Oklahoma seeks to enjoin that which is lawful in Arkansas, the Oklahoma Law Claims must be dismissed.

B. OKLAHOMA'S FEDERAL COMMON LAW NUISANCE CLAIM HAS BEEN DISPLACED BY THE CLEAN WATER ACT

Oklahoma's federal common law claim also fails because there is no federal common law of nuisance applicable to its claim of interstate water pollution. As discussed below, at one time in American jurisprudence interstate water quality disputes were decided by reference to judge-made federal common law. However, since *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the United States Supreme Court has recognized federal common law only in limited areas that are notably few and restricted. The Supreme Court has also made clear that even if a federal common law cause of action is recognized, it may be displaced at any time by an Act of Congress.

Stat. tit. 50 § 4 ("Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance").

In this case, the body of federal common law on which Oklahoma relies has been displaced by Congress' enactment of the Clean Water Act ("CWA") and amendments thereto. The CWA, more formally known as the 1972 Amendments to the Federal Water Pollution Control Act, is a far-reaching and complex statutory scheme that Congress intended "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a), CWA § 101(a). As discussed below, the CWA is implemented through a balanced Federal-State partnership that carefully allocates responsibilities among varying levels of government. Accordingly, because the law on which Oklahoma's federal common law nuisance claim relies has been displaced, Oklahoma's claim must be dismissed for failure to state a claim upon which relief can be granted.

1. "There is no general federal common law"

In order for a plaintiff to obtain relief in federal court, the plaintiff must show that "a cause of action is available." *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 595 (1983). Prior to the Supreme Court's decision in *Erie*, the federal courts occasionally created causes of action that had not been established by Congress. In particular, the federal courts had developed a body of federal common law to govern interstate environmental nuisance claims brought by States. *See, e.g.*, *New Jersey v. New York*, 283 U.S. 336 (1931) (addressing controversies between States that are fed by the same river basin); *New York v. New Jersey*, 256 U.S. 296 (1921) (addressing controversies between States that border the same body of water); *Missouri*, 200 U.S. 496 (addressing controversies between a State that introduces pollutants into a waterway and a downstream State that objects). In *Erie*, however, the Supreme Court held that "[t]here is no federal general common law." 304 U.S. at 78. The Court thereby eviscerated the foundation upon which prior common law interstate environmental nuisance precedents rested.

In short, "*Erie* recognized . . . that a federal court could not generally apply a federal rule of decision, despite the existence of jurisdiction, in the absence of an applicable Act of Congress." *Milwaukee v. Illinois* ("*Milwaukee II*"), 451 U.S. 304, 313 (1981).

2. Federal Common Law Only Exists In Limited Areas And May Be Displaced At Any Time By Congress

Since *Erie*, the Supreme Court has held that the federal courts may create common law rules only when Congress has not spoken to a particular issue and when there exists a "significant conflict between some federal policy or interest and the use of state law." *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966). Under this standard, the areas in which the federal courts may formulate federal common law only are "limited" and notably "few and restricted." [3] *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (internal citations omitted); *see also Milwaukee II*, 451 U.S. at 313. This narrow standard recognizes that federal common law is "subject to the paramount authority of Congress," *Milwaukee II*, 451 U.S. at 313-14 (*quoting New Jersey*, 283 U.S. at 348). In particular, the Supreme Court has applied these separation-of-powers principles to refuse to create federal common law in cases that involve "a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot." *Texas Indus.*, 451 U.S. at 647 (*quoting Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980)). As the Supreme Court has noted:

> Federal courts, unlike state courts, are not general common law courts and do not possess a general power to develop and apply their own rules of decision. The enactment of a federal rule in an area of national concern and the decision whether to displace state

[3] Those instances "fall into essentially two categories": first, where "Congress has given the courts the power to develop substantive law"; and second, where "a federal rule of decision is necessary to protect uniquely federal interests." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (citations and internal quotation marks omitted). Neither instance is present here.

> law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress. We start with the assumption that it is for Congress, not federal courts, to articulate appropriate standards to be applied as a matter of federal law.

National Audubon Society v. Dept. of Water & Power of the City of Los Angeles, 869 F.2d 1196, 1201 (9th Cir. 1988) (*quoting Milwaukee II,* 451 U.S. at 312-13, 317) (internal quotation marks omitted).

3. The Clean Water Act And Its Subsequent Amendments Displaced Federal Common Law On Issues of Interstate Water Quality

Prior to the enactment of the CWA, the Supreme Court reviewed the then-sparse Congressional regulation of water quality. In the absence of any detailed congressional action or consideration of interstate water quality issues, the Court recognized the existence of a federal common law claim for abatement of a nuisance caused by interstate water pollution. *See Milwaukee v. Illinois* ("*Milwaukee I*"), 406 U.S. 91 (1972). However, the Supreme Court stated that this federal common law cause of action would cease to exist if Congress displaced it through legislation. *See id.* at 107 n.9.

Five months after the Court decided *Milwaukee I*, Congress passed the CWA. Pub. L. No. 92-500, 86 Stat. 816 (Oct. 18, 1972). The CWA and its extensive regulations bear no resemblance to the regulatory scheme at issue in *Milwaukee I*, where federal regulation of water pollution was minimal. The universe of federal water protections at the time of *Milwaukee I* included only (1) "some surveillance by the Army Corps of Engineers over industrial pollution, not including sewage" under the Rivers and Harbors Act; (2) the consideration of the environment in federal decisionmaking under the National Environmental Policy Act; (3) an expression of "increasing concern with the quality of the aquatic environment" through the passage of the Fish and Wildlife Act of 1956 and its amendments; (4) an Army Corps of

Engineers rule expressing "new and expanding policies" requiring permits for discharges into navigable waters; and (5) the Water Quality Standards under the Federal Water Pollution Control Act. *Milwaukee I*, 406 U.S. at 101-02. Few regulations existed as the nascent EPA was only two years old at the time. *See* Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (Oct. 6, 1970) (creating the EPA from portions of the Department of the Interior, Department of Health, Education, and Welfare and Department of Agriculture). Even with this barren regulatory backdrop, however, the Supreme Court relied on a savings clause in the CWA which expressly preserved "state and interstate action[s] to abate pollution of interstate or navigable waters. . . ." *Milwaukee I*, 406 U.S. at 104.

In contrast to this regulatory void, the CWA extensively regulated issues of water quality, demonstrating that Congress carefully considered interstate water pollution and chose some remedies while omitting others. Under the CWA, the sources of alleged pollution in the IRW must fit within one of two classifications: either a "point source" or a "nonpoint source." *See Pronsolino v. Nostri*, 291 F.3d 1123, 1125-26 (9th Cir. 2001). "Point source" water pollution comes from a single, identifiable source or "point" such as a factory or sewage plant. *See International Paper Co. v. Ouellette*, 479 U.S. 481, 485 n.4 (1987). For example, certain concentrated animal feeding operations (called "CAFOs"), are defined as point sources under the CWA. *See* 33 U.S.C. § 1362(14). All other generalized sources of alleged pollution are considered to be "nonpoint" sources of pollution, including "rainfall or snowmelt moving over and through the ground and carrying natural and human-made pollutants" into surface or groundwater. 68 Fed. Reg. 60,653, 60,655 (Oct. 23, 2003); *see also Pronsolino*, 291 F.3d at 1126. Both point and nonpoint sources are subject to various levels of regulation, the specifics

of which have varied over time as the EPA has implemented the CWA's provisions. *See*, *e.g.*, *Pronsolino*, 291 F.3d at 1126.

In addition to creating this regulatory system, Congress further indicated its intent to displace federal common law for interstate water pollution by repealing the savings clause which served as the principal basis of the Court's decision in *Milwaukee I*. *See* H.R. Rep. No. 92-911 at 173 (1972) (listing §10(b) of the Federal Water Pollution Control Act among the "Existing Law" supplanted by the CWA).

Following the CWA's enactment, the Supreme Court held in *Milwaukee II* that the federal government's comprehensive regulatory scheme displaced the plaintiff State's federal common law nuisance claims. 451 U.S. at 307-08. The Court thereby resolved any doubt that Congress had displaced all interstate water pollution claims based on federal common law. *Id.* at 325 ("The invocation of federal common law . . . in the face of congressional legislation supplanting it is peculiarly inappropriate in areas as complex as water pollution control."); *see also Arkansas*, 503 U.S. at 99 (stating that *Milwaukee II* held that federal law displaced the federal common law tort of nuisance with respect to transboundary water pollution claims); *Ouellette*, 479 U.S. at 492 (stating that Congress intended for the CWA to "dominate the field of [interstate water] pollution regulation.").

While the Court's decision in *Milwaukee II* addressed a case involving a point source, the standard for determining when Congress has displaced federal common law makes clear that the CWA displaces all federal common law governing interstate water pollution. The test for finding displacement is different from—and far less demanding than—the standards that govern preemption of state law. Because "it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law," courts should approach the

question of displacement with a "willingness to find congressional displacement of federal common law." *Milwaukee II*, 451 U.S. at 317 & n.9 (emphasis deleted). As long as "the scheme established by Congress addresses the problem formerly governed by federal common law," *id.* at 315 n.8—*i.e.*, if Congress has "spoken to [the] particular issue," *id.* at 313—federal common law is displaced. *See also United States v. Oswego Barge Corp. (In re Oswego Barge Corp.)*, 664 F.2d 327, 335 (2d Cir. 1981) (federal common law displaced "as to every question to which the legislative scheme 'spoke directly,' and every problem that Congress has 'addressed'. . . . [and] separation of powers concerns create a presumption in favor of [displacement] of federal common law whenever it can be said that Congress has legislated on the subject") (*quoting Milwaukee II*, 451 U.S. at 315).

Moreover, subsequent to *Milwaukee II*, Congress has supplemented the CWA's regulation of nonpoint sources that may cause transboundary water pollution. Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 42 (1987). Under the current, amended CWA, federal involvement in managing nonpoint sources begins with each State's development of Water Quality Standards. These standards require States to specify (1) a designated use for each individual water body (such as recreation or a source of drinking water); (2) the maximum amount of pollutants that the water body can tolerate while serving this desired use; and (3) an antidegradation review policy. *See, e.g.*, 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131; *American Wildlands v. Browner*, 260 F.3d 1192, 1194 (10th Cir. 2001). These standards, along with a Water Management Plan, are submitted to EPA for approval or rejection with required changes. 33 U.S.C. § 1313(c)(2)-(3). "The EPA provides states with substantial guidance in drafting water quality standards," *City of Albuquerque v. Browner*, 97 F.3d 415, 419 n.4 (10th Cir. 1996) (*citing* 40 C.F.R. § 131.11), and the entire process requires public notice and a public hearing.

33 U.S.C. § 1313(c)(1); 40 C.F.R. § 131.10(e). Where these Water Quality Standards are not met, each State is obligated to list and prioritize substandard water bodies, called "impaired waters." 33 U.S.C. § 1313(d)(1)(A) & (B). For each impaired water, the State must calculate the Total Maximum Daily Load ("TMDL") of pollutants that the water body can receive without exceeding Water Quality Standards. 33 U.S.C. § 1313(d)(1)(C), CWA § 303(d)(1)(C); 40 C.F.R. § 130.7. Both mechanisms aid in determining the contribution of nonpoint sources to impaired waters and how best to control them on a watershed-by-watershed basis. The Ninth Circuit's description of the TMDL program shows how this "intricate scheme" is interconnected: "TMDLs serve as a link in an implementation chain that includes federally-regulated point source controls, state or local plans for point and nonpoint source pollution reduction, and assessment of the impact of such measures on water quality, all to the end of attaining water quality goals." *Pronsolino*, 291 F.3d at 1128-29.

The Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 42 (1987), amended the CWA required States to provide detailed reporting and planning requirements for nonpoint sources. CWA § 319 requires each State to submit a State Assessment Report to EPA, after holding a State-level notice and comment rulemaking, identifying (1) impaired waters "which, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to maintain applicable water quality standards . . ."; (2) categories and subcategories of nonpoint sources and "particular nonpoint sources which add significant pollution" to impaired waters; (3) a process that uses "intergovernmental coordination and public participation" to develop best management practices ("BMPs") for controlling each category and subcategory of nonpoint source "to the maximum extent practicable"; and (4) programs to control nonpoint source pollution. 33 U.S.C. § 1329(a)(1). The EPA Administrator may reject the plan as inadequate,

mandate resubmission with modifications by the State, 33 U.S.C. § 1329(d)(2), or prepare its own report if the State refuses to comply. 33 U.S.C. § 1329(d)(3). *See also Pronsolino*, 291 F.3d at 1138-39 (describing regulation under CWA § 319).

States also must provide EPA, after public notice and a hearing, a management program containing the following: (1) identification of BMPs and measures to reduce nonpoint source pollution from each category and subcategory; (2) identification of all programs that can aid in implementing the BMPs; (3) a schedule of "annual milestones" for implementation of the BMPs; (4) the State Attorney General's certification that State laws provide adequate authority to impose the BMPs on nonpoint sources; and (5) a list of federal grant programs that will aid the program. 33 U.S.C. § 1329(b)(2). Each management plan must be developed on a watershed-by-watershed basis with the help of technical experts, 33 U.S.C. § 1329(b)(3), (4), (e), and submitted to EPA for approval. 33 U.S.C. § 1329(d). The EPA Administrator may reject the plan as inadequate and mandate resubmission with modifications by the State. 33 U.S.C. § 1329(d)(2). "Under section 319(b), all States have . . . adopted management programs to control nonpoint source pollution." 68 Fed. Reg. at 60,655. Together with CWA §303, § 319 "is one of numerous interwoven components that together make up an intricate statutory scheme addressing technically complex environmental issues." *Pronsolino*, 291 F.3d at 1133. Congressional action has thus displaced federal common law for interstate water pollution disputes arising from both point and nonpoint water pollution.

In light of this detailed scheme of point and nonpoint source regulation, Plaintiffs cannot escape the holding of *Milwaukee II* by complaining that Congress did not address the particular facts of this case or that the CWA does not provide an adequate remedy. Congress has "spoken to [the] particular issue" of nonpoint source pollution, and therefore federal common law is

displaced. *Milwaukee II*, 451 U.S. at 313. Congress need not create an alternative remedy to displace federal common law. "The lesson of *Milwaukee II* is that once Congress has addressed a national concern, our fundamental commitment to the separation of powers precludes the courts from scrutinizing the sufficiency of the congressional solution" or "holding that the solution Congress chose is not adequate." *Illinois v. Outboard Marine Corp.*, 680 F.2d 473, 478 (7th Cir. 1982).

There can be no doubt that Congress has "addressed" and "spoken to" the issue of both point and nonpoint interstate water pollution in the CWA. Although the Plaintiffs may not approve of Congress' policy choices, Oklahoma's federal common law claim should be dismissed because it, and all other interstate water pollution claims based on federal common law, have been displaced by Acts of Congress. Oklahoma cannot avoid the fate of the plaintiff in *Milwaukee II* by merely electing not to bring a statutory claim against the defendants under the CWA or by asserting claims under other federal statutes. Simply put, all federal common law causes of action for nuisance based on interstate water pollution no longer exist, irrespective of whether the claim is based on allegations of point source or nonpoint source pollution. Accordingly, Count Five of the complaint should be dismissed for failure to state a claim upon which relief can be granted.

V. CONCLUSION

For the foregoing reasons counts four, five, six, seven, eight, nine, and ten of the Complaint should be dismissed.

Dated: January 22, 2007

Respectfully submitted,

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